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BellSouth Corporation
Legal Department
Suite 900
1133 21st Street, N.W.
Washington, D.C. 20036-3351

barbee.ponder@bellsouth.com

L. Barbee Ponder IV
Senior Regulatory Counsel-D.C.

202 463 4155
Fax 202 463 4605
Cell 202 215-6364

May 23, 2003

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
Room TW-A-325
The Portals, 445 12th Street, S.W.
Washington, D.C. 20554

Re: Oral Ex Parte Presentation,
CC Docket Nos. 02-33, 95-20, 98-10, 02-52

Dear Ms. Dortch:

On Thursday, May 22, 2003, BellSouth made an oral presentation relating to the dockets identified above to the following members of the Commission's Office of General Counsel: John Rogovin, John Stanley, Jeff Dygert and Jacob Lewis. Representing BellSouth at these meetings were Eric Fogle, Jonathan B. Banks, Sean Lev (Kellogg, Huber) and the undersigned. The attached presentation was distributed at this meeting and formed the basis of the discussion.

On Thursday, May 22, 2003, BellSouth also made an oral presentation relating to the dockets identified above to the following members of the Commission's Media Bureau: Barbara Esbin, Eric Bash, John Norton, and Alison Greenwald. Representing BellSouth at these meetings were Eric Fogle, Jonathan B. Banks, Glenn T. Reynolds, Sean Lev (Kellogg, Huber) and the undersigned. The attached presentation was distributed at this meeting and formed the basis of the discussion.

Pursuant to section 1.1206(b)(2) of the Commission's rules, this letter and attachments are being provided for inclusion in the record of the above-referenced proceedings.

Sincerely,

L. Barbee Ponder IV

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BellSouth's May 22, 2003 Presentation,
Legal Requirements and Justification For Regulatory Parity: Summary::

- EarthLink's own prior advocacy recognizes that Regulatory Parity between like services is required.

- The Constitution precludes differential treatment of the analogous expressive activities of cable and telecommunications companies.

- The 1996 Act, this Commission's decisions, and judicial precedent also require that the Commission treat like services alike.

- Telcos do not have sufficient market power to warrant continued common carrier treatment of the broadband transmission underlying its information services.

EarthLink's Prior Advocacy:

- (1) Recognized the dominance of the cable modem transmission platform: "When these customer preference trends are combined with the tremendous rate of growth in broadband demand generally, it becomes clear that cable-based broadband is the dominant form of broadband Internet access". Comments of EarthLink, Inc., *Inquiry Concerning High-Speed Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, at 2 (FCC filed Dec. 1, 2000)("*EarthLink Cable Comments*");

- (2) Recognized that the Commission "has found on numerous occasions that Congress intended the 1996 Act to be technologically neutral ..." *Id.* at 46;

- (3) Affirmatively stated that there is "[a]s a matter of law ... no support in the Act for different regulatory treatment of these identical services based solely on the type of facilities used ..."*Id.* at 48;

- (4) Recognized that it is unable "to determine any principle that would allow the Commission to use its forbearance authority with respect [to] cable modem services, but not with respect to the facilities-based transmission of information services by other telecommunications carriers, including dominant and non-dominant local exchange carriers." *Id.* at 57;

- (5) Recognized that "[g]iven the Act's fundamental premise that regulation of telecommunications services is to be technologically neutral, if the Commission were to allow cable companies to discriminate in the provision of telecommunications services, how could it then deny similar relief to other common carriers?" *Id.*;

- (6) "If the Commission were to accept the argument that an information service provided through an affiliate of the transport facility owner can be made available to the public without having the transmission service used to carry that information service to the public being considered a telecommunications service, *it would provide a blanket waiver for all facilities-based telecommunications carriers to escape Title II regulation under the Act.*" *Id.* at 29 (emphasis added).

The First Amendment Requires Parity In the Regulation of Analogous Expressive Activity:

- Just like Cable Modem providers, telco broadband providers engage in expressive activity subject to the First Amendment. BellSouth's ISP transmits its own content, and engages in editing functions such as the use of filters to screen information. Forced access would displace this content and requires BellSouth to carry the speech of others. For analogous reasons, the federal court in *Broward County* found that the First Amendment applied.

- BellSouth is thus providing "original programming" and exercising "editorial discretion" and under *Turner I*, its activities trigger heightened First Amendment scrutiny.

- A decision that required telcos but not cable providers to offer open access could not survive such scrutiny because it is grossly *underinclusive*. That underinclusiveness diminishes the credibility and significance of the government's purported interest, and would likely lead to a reversal here.

- The Supreme Court has repeatedly relied on that fact in striking down rules:
  - Law that banned some newsracks but not others can't be justified based on aesthetics (Discovery Networks)
  - Law intended to protect victims of sexual assault fails where it does not apply to all means of communication (Florida Star).

The 1996 Act Requires That the Commission Treat Like Services Alike:

- Regulatory classifications in the 1996 Act are "based solely upon the nature of the service, not who provides it or how." *EarthLink Cable Comments* at 45.

- The 1996 Act is based on functional categories.

- Cable services, whether provided over copper, coax or fiber, and whether provided by a cable or a telephone company, are regulated under Title VI;

- Telecommunications services, whether provided by a telephone or cable company, are regulated under Title II.

- Section 706 directs the Commission to "encourag[e]" the deployment of "advanced telecommunications capability" generally.

- Congress defined "advanced telecommunications capability" not in terms of a specific technology or platform, but rather as "high-speed, switched broadband telecommunications capability" "*without regard to any transmission media or technology*." 47 U.S.C. § 157 note (emphasis added).

Prior Commission Decisions Support Regulatory Parity:

- The Commission has repeatedly stressed that the 1996 Act is "technology neutral."

- The Commission's articulated guiding principles in this docket support regulatory parity between the like services provided by cable and telephone companies: "[T]he Commission will strive to develop an analytical framework that is consistent, to the extent possible, across multiple platforms." *Wireline Broadband NPRM*, ¶ 6.

- The Commission recently concluded:
    - (1) that Internet access services provided via cable modem technology are unregulated, "information services;"
    - (2) that the underlying transmission of such services is "telecommunications;" and
    - (3) that there is no Title II common carriage requirement for such transmission.

- These determinations necessitate similar conclusions for the analogous services provided by telephone companies. As the Commission explained in the Cable Declaratory Ruling (¶ 35), the statutory definitions in the 1996 Act – and the regulatory consequences that flow from those definitions – rest not "on the particular types of facilities used" but rather "on the function that is made available."

Judicial Precedent Requires Regulatory Parity:

- Federal Courts have reversed those Commission decisions that have failed to follow a functional approach.

- When the Commission determined that, regardless of the particular service at issue, anything offered by a service provider primarily in the business of common carriage *is* "common carriage," the D.C. Circuit overturned that decision, noting that "[w]hether an entity in a given case is to be considered a common carrier" turns "on the particular practices under surveillance." *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (emphasis added).

- When the Commission imposed line-sharing on wireline carriers after engaging in an analysis that looked only at a particular technology (wireline broadband) to the exclusion of other platforms that provided the same functionality (including cable modem), the D.C. Circuit vacated its decision as "quite unreasonable" and based on a "naked disregard for the competitive context." *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003) ("USTA").

- Similarly, the Sixth Circuit has reversed the Commission's differential treatment of cellular and PCS precisely because those services were functionally analogous. *See Cincinnati Bell Tel. Co. v. FCC*, 69 F. 3d 752 (6th Cir. 1995).

What Should the Commission Do?

- Adopt tentative conclusions in *Wireline Broadband NPRM*;
- Remove all *Computer II/III* obligations from Wireline Broadband services;
- Remove all Title II common carriage requirements from the telecommunications component of any Wireline-provided information service.
- Preempt state regulation of information services.